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SUPREME COURT, U.S.

No. 07-1553

In The
Supreme Court of the United States

CITY OF THE DALLES,
A political subdivision of the State of Oregon,
Petitioner,

v.

T.R.,
Respondent.

On Petition For A Writ of Certiorari
to the State of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state Supreme Court err when it applies the appropriate federal standard for the accrual of the statute of limitations in Sec. 1983 cases if it also refers to state cases that apply the same rule?

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OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at *T.R. v. Boy Scouts of America*, 344 Or. 282, 181 P.3d 758 (Or. 2008). The opinion of the Oregon Court of Appeals is reported at *T.R. v. Boy Scouts of America*, 205 Or.App. 135, 133 P.3d 353 (Or.App. 2006). The opinion of the trial court is unreported.

JURISDICTION

The Supreme Court of Oregon filed its opinion on March 13, 2008. Petitioner invoked this Court's jurisdiction under 28 U.S.C. § 1254(1). This brief in opposition is being filed within the 30-day period prescribed by Rule 15 of the Court, as computed in accordance with Rule 30 of the Court.

STATEMENT OF THE CASE

Petitioner's only meaningful objection to the decision below is against the jury's factual determination regarding the reasonableness of the timing of Plaintiff's filing – and not with the legal standard applied.

Plaintiff was sexually molested by a police officer and his Explorer Scout leader, James Donald Tannehill, for several years, commencing in 1996, when he was 16 years-old. Tannehill groomed Plaintiff with compliments regarding his body, alcohol, and sexual comments. Plaintiff was rebuffed when he asked other officers about Tannehill.

Five years later, though, he learned through a newspaper article and then state police questioning at a grand jury proceeding, that the City of Dalles police department had acted with deliberate indifference to the sexual abuse of children by its officers, a policy that directly affected him. Before that time, he did not know that there was a city policy of deliberate indifference.

Both parties agree that the law governing the issue of deliberate indifference under Sec. 1983 is found in Oregon's two-year general personal injury limitations, OR. REV. STAT. ANN. § 12.110(1) (West 2008), which establishes a two-year limitation. The parties also agree that the question before the courts with respect to this claim has been when the claim for deliberate indifference should accrue.

Petitioner makes the illogical claim that Plaintiff should have known of the city's policy of deliberate indifference at the time of Tannehill's sexual molestation of Plaintiff. Plaintiff, however, could not have discovered the city's constitutional violations until 2001 when he learned of the city's policy of deliberate indifference through the grand jury proceedings against Tannehill, where Plaintiff was asked to testify during a process that included numerous city personnel also testifying. *T.R. v. Boy Scouts of America*, 344 Or. 282, 181 P.3d 758 (Or. 2008).

The Oregon Supreme Court applied the common law discovery rule for accrual, as federal law requires, to determine the sole

question before it: whether "a reasonable jury could . . . have reached the conclusion that plaintiff reasonably did not discover the city's role in 1996." *T.R. v. Boy Scouts of America*, 344 Or. 282, 285 181 P.3d 758, 759 (Or. 2008); see also *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007).

The Court concluded that a reasonable jury could have concluded that Plaintiff acted reasonably by filing within the 2-year statute of limitations following the 2001 grand jury proceedings that led him to learn about the city's policy of deliberate indifference.

Plaintiff filed four claims initially, a state and a federal claim against the sexual perpetrator, Tannehill, and a state and later a federal claim against the city, the Petitioner. The sexual perpetrator's liability was based on the sexual molestation itself. The City's liability was based on its policy of deliberate indifference to the sexual abuse of children by its police officers.

A verdict was reached against Tannehill on the state claim. The claim fell within the statute of limitations, because Oregon applies a distinctive discovery rule to cases of child sex abuse. The claim does not accrue until the plaintiff discovers the causal connection between the child abuse and a subsequent injury. OR. REV. STAT. ANN. § 12.117 (West 2008); *Adams v. Oregon State Police*, 289 Or. 233, 237-39, 611 P.2d 1153 (Or. 1980). Tannehill did not appeal the verdict against him.

The federal claim against Tannehill did not go forward, because the federal discovery rule sets accrual at the time of discovery of the injury and the actions of the tortfeasor. Therefore, the statute of limitations accrued with respect to Tannehill at the time of the sexual molestation, and the 2003 filing was more than two years past that date.

The state law claim against the City was foreclosed by the Oregon Tort Claims Act (OTCA), which sets the state accrual rule for tort claims against state actors as of the date of the initial injury. OR. REV. STAT. ANN. § 30.275 (West 2008). The 2003 filing was beyond the 2-year statute of limitations if calculated from the date of the sexual molestation.

The only claim left, which is the subject of Petitioner's petition for certiorari, is the federal Sec. 1983 claim against the City. That claim is governed by this Court's rulings in *Wilson v. Garcia*, 471 U.S. 261, 267, 105 S.Ct. 1938, 1942 (1985), and *Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 574 (1989), that Sec. 1983 actions use the forum state's residual statutes of limitations, plus relevant tolling provisions, and not any specialized tort statutes of limitation that might otherwise apply. Therefore, the accrual rules applied in the tort claim against Tannehill under the state's child sex abuse statute and under the OTCA are inapplicable. The general, residual personal injury statutes of limitations are determined by ORS 12.110. OR. REV. STAT.

ANN. § 12.110 (West 2008). They are accrued according to the common law rule of discovery: a plaintiff has two years past the time when he knew or should have known that the tortfeasor had acted in ways to harm him.

The issue before this Court is whether the jury acted reasonably in concluding that Plaintiff's 2003 filing on the deliberate indifference claim was timely under this rule of accrual.

The Court below held that the jury's conclusion was within the realm of reasonable conclusions based on the evidence and the common law discovery rule : "The city argues that a reasonable jury would *necessarily* have concluded from those facts that plaintiff should have known that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury could have reached that conclusion, we do not agree that that was the *only* conclusion a reasonable jury could have reached." *T.R. v. Boy Scouts of America*, 344 Or. 282, 296-97, 181 P.3d 758, 766 (Or. 2008) (emphasis added).

ARGUMENT

A. There Is No Justification for this Court to Grant Certiorari, Because the Oregon Supreme Court Applied the Appropriate Federal Standard for Accrual of Statutes of Limitations in Sec. 1983 Cases

The court below applied the required federal rule of accrual – a common law discovery rule that sets the time for filing a claim according to when the plaintiff knew of should have known of the injury and and of the cause of the harm. The discovery of these elements may differ for different defendants. The same common law rule applies under Oregon law, and, therefore, several Oregon cases explaining the principles of the common law rule were cited in the opinion below.[1] That is no basis for this Court to grant certiorari.

1. Federal law applies to determine the accrual of the statute of limitations under Sec. 1983

The date on which a plaintiff's federal action under Sec 1983 for a violation of the Fourteenth Amendment, including deliberate

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[1] The Petitioner quotes excerpts from the oral argument before the Oregon Supreme Court in an attempt to create the impression that the Oregon Supreme Court ignored the federal standard and applied a wholly different standard under state law. Pet. at 13-14. Given that they are the same, the argument is pointless.

indifference to child sex abuse, accrues is determined by federal law. "Aspects of §1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles." *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007).

The federal rule of accrual applied in the vast majority of circuits is a discovery rule: the cause of action accrues when the plaintiff "knows or reasonably should have known" there is a government policy that has caused an injury. *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (statute of limitations does not accrue until plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action); *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (same); *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991) (same); *Pete v. Metcalfe*, 8 F.3d 214 (5th Cir. 1993) (same); *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003) (same); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006) (same); *White v. Garrison*, 70 F.3d 1276 (8th Cir.1995)(same); *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) (same); *but see Nassim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir.1995), *cert denied*, 516 U.S. 1177 (1996) (cause of action accrues when plaintiff has sufficient facts to create "duty to inquire").

2. The rule in Oregon of accrual for general liability claims is the same as the federal rule

The general personal injury liability rule in

Oregon employs the same common law accrual standard as the federal accrual rule. *Doe v. American Red Cross*, 322 Or. 502, 512 910 P.2d 364, 369 (Or. 1996) ("the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements (harm, causation, and tortious conduct) exists") (quoting *Frohs v. Greene*, 253 Or. 1, 4, 452 P2d 564 (Or. 1969)); *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) ("the statute of limitations runs separately from the occurrence of each civil rights violation that causes actual damage to the plaintiff (as long as the plaintiff knows or should have known of the injury)"); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (same); *Pete v. Metcalfe*, 8 F.3d 214 (5th Cir. 1993) (same); *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003) (same); *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (same); *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (same); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920 (1981) (same); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (11th Cir. 1980) (same). Both reflect the common law discovery rule.

Moreover, the Oregon Supreme Court did not claim to be applying Oregon law *per se*, but rather referred to its cases to illuminate the same accrual principle present in federal and state law, saying "We set forth the *reason* for recognizing a discovery accrual rule in *Berry v.*

Branner," *T.R. v. Boy Scouts of America*, 344 Or. 282, 291, 181 P.3d 758, 763 (Or. 2008) (emphasis added). The Court below underscored that its discussion was not peculiar to Oregon law; noting that the Oregon discovery rule "mirrors the generally applicable common-law discovery rule," *Berry v. Branner*," *T.R. v. Boy Scouts of America*, 344 Or. 282, 292, 181 P.3d 758, 763 (Or. 2008)

This Court has articulated this same standard in cases involving Federal Tort Claim Act and RICO claims. The Oregon Supreme Court pointed to such cases when it noted that its conclusion is also consistent with this Court's view of the federal accrual rule – the key is whether the plaintiff knew or should have known the facts necessary to bring a claim. If not, the claim does not accrue. *T.R. v. Boy Scouts of America*, 344 Or. 282, 294, 181 P.3d 758, 764 (Or. 2008) (""that [the plaintiff] has been hurt" *and* "who has inflicted the injury" as "critical facts" that a plaintiff must know to start the statute of limitations running.") (quoting *U.S. v. Kubrick*, 444 U.S. 111, 122 (1979) (ignorance of legal significance of facts does not delay accrual of FTCA action)); *Rotella v. Wood*, 528 U.S. 549 (2000) (accrual starts when the person identifies the injury; psychiatric patient's RICO action was not delayed until he discovered alleged *pattern* of racketeering activity by known defendants).

Therefore, the correct standard was applied, regardless of the cases cited to explain the court's ruling. Whether one refers to

Oregon state law or federal law on this particular issue, the same common law rule would be applied and the result would have been the same.[2]

As the Oregon Supreme Court explained: "the statute of limitations does not begin to run until a reasonably prudent plaintiff perceives both the injury and the role that the defendant has played in that injury. *Schiele v. Hobart Corporation*, 284 Or. 483, 490, 587 P.2d 1010 (1978). In both respects Oregon law mirrors the generally applicable common-law discovery rule." *T.R. v. Boy Scouts of America*, 344 Or. 282, 291-92, 181 P.3d 758, 763 (Or. 2008).[3]

3. The Petitioner's objection at base is that it disagrees with the jury's factual conclusion regarding the reasonableness of the Plaintiff's discovery of the deliberate indifference of the Petitioner's police force to child sexual abuse

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[2] *Plumeau v. School Dist. No. 40 County of Yamhill*, 130 F.3d 432 (9th Cir. 1997), relied upon by petitioners, articulates the same discovery rule. Moreover, in that case, the filing was assumed timely, and the court addressed the Sec. 1983 claim on the merits.

[3] Having lost on the proper accrual rule standard, Petitioner tries to displace settled law with selected quotations referring to "a complete and present cause of action." Pet. at 15, 17. Petitioner is obviously trying to argue that Plaintiff was required to follow the rejected rule that every conceivable cause of action against every must be filed at the same time – even when the plaintiff does not know of the injury or identity of the tortfeasor, as Plaintiff in this case did not.

by its officers

What the plaintiff knew and whether the timing of his claims against the government was reasonable were questions of fact for the jury. A jury's determination of the facts merits considerable deference. As the Oregon Supreme Court noted, "[t]he city argues that a reasonable jury would necessarily have concluded from those facts that plaintiff should have known that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury could have reached that conclusion, we do not agree that that was the only conclusion a reasonable jury could have reached." *T.R. v. Boy Scouts of America*, 344 Or. 282, 296-97, 181 P.3d 758, 766 (Or. 2008).

The Oregon Supreme Court further correctly concluded that "based on the evidence in this record, a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused him harm." *T.R. v. Boy Scouts of America*, 344 Or. 282, 298, 181 P.3d 758, 767 (Or. 2008). Petitioner has failed to present any argument that justifies this Court's attention.

CONCLUSION

Petitioner has attempted to create the illusion of legal error where there is none.

There is no reason for this Court to grant certiorari to review the decision below. For the foregoing reasons, the petition for the writ of certiorari should be DENIED.

Respectfully submitted,

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